

No. 83-1055

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In The
Supreme Court of the United States
October Term, 1983

DENNIS HAHN,

Appellant,

vs.

BRYANT-POFF, INC.,

Appellee.

MOTION TO DISMISS

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QUESTION PRESENTED FOR REVIEW

- I. Bryant-Poff, Inc., the Appellee herein, states that no issue has been raised by Dennis Hahn, the Appellant herein, to cause the issuance by this court of a Writ of Certiorari.

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OPINIONS BELOW

The opinion of the Court of Appeals of Indiana, First District, dated December 22, 1982, is reported at 454 N.E.2d 1223.

The Supreme Court of Indiana, after a Petition for Rehearing was denied by the Court of Appeals of Indiana, First District, denied a "Request for Transfer" on September 29, 1983. Justice Hunter dissented in a written opinion in which Justice DeBruler concurred and the same is reported at 453 N.E.2d 1171.

The opinions appear in the Appendix to the Jurisdictional Statement of Dennis Hahn.

JURISDICTION AND CONSTITUTIONAL PROVISIONS INVOLVED

Appellee herein, Bryant-Poff, Inc., by its Motion to Dismiss herein filed, states that the appeal is not within the jurisdiction of this court and that this appeal be dismissed.

STATEMENT OF THE CASE

Appellee is satisfied with the presentation of Appellant's statement of the case *with exception* to his statement made at "page 6" with reference to his discussion of the reported case of *Hoffman v. E. W. Bliss Company*, (1983) —Ind. —, 448 N.E.2d 277, wherein he stated:

"Here, the Supreme Court reversed and remanded a trial court judgment in favor of the defendant, Bliss, and decided that whether the danger of the product involved was a latent one or was 'open and obvious' was

a question of fact for the jury to determine." (Emphasis added.)

The *Hoffman v. E.W. Bliss Company* case, "Ibid", was remanded to the trial court for a new trial by reason that the trial court gave an erroneous instruction to the jury regarding the defense of "misuse" as it relates to this products liability cause of action. (See Petitioner's Appendix re: *Hoffman* case, pp. A-104 - A-105.)

Defendant, E. W. Bliss Company, made further argument to the Indiana Supreme Court that even if the instruction in question was erroneous, the "open and obvious danger rule" served to save the instruction's misstatement of law.

After a careful examination of the evidence presented in the *Hoffman* case, "Ibid", the Indiana Supreme Court stated:

"In *Bemis*¹ the danger was open and obvious. In the case at bar the danger of a *double trip* which injured Hoffman was a *latent danger* of which Hoffman *had no warning*. We conclude, therefore, the open and obvious danger rule of *Bemis* case cannot serve to save the instruction's misstatement of law that use in the face of inadequate warnings is misuse." (Emphasis added.) (See p. A-93 Appendix of Petitioner's Jurisdictional Statement.)

¹*Bemis Company, Inc. v. Rubish*, (1981) — Ind. —, 421 N.E.2d 1058, Cert. denied, 74 L.Ed.2d 61, 103 S.Ct. 57.

SUMMARY OF ARGUMENT TO DISMISS APPEAL

Pursuant to Rule 16, paragraph 1(b), of the revised rules of this Court, Appellee moves that this appeal be dismissed on the following grounds:

I. The federal question sought to be reviewed was neither timely nor properly raised and was not expressly passed on.

II. The appeal does not present a substantial federal question.

III. The judgment of the Supreme Court of the State of Indiana rests on adequate non-federal basis.

ARGUMENT

I.

It is respectfully submitted that there is no federal question to be reviewed: the appeal does not present a substantial federal question; and, the judgment of the Supreme Court of Indiana rests on adequate non-federal basis.

However, we respectfully submit that the "federal constitutional question" averred to was first raised in what Appellant's counsel titled "Appellee's Petition for Rehearing." (See Appendix of Petitioner, p. A-52.)

That petition was filed with the Clerk of the Indiana Supreme Court on October 8, 1983, *after* the Indiana Supreme Court denied Hahn's "Petition to Transfer" on September 29, 1983.

The Indiana Supreme Court's "Denial of Appellee's Petition for Rehearing" was dismissed pursuant to Appellate Rule 11(B)(8). (See Appendix of Petitioner, p. A-57.)

Indiana Appellate Rule 11(B)(8) states:

"No petition for rehearing will be permitted to be filed upon the denial of a petition to transfer. No extension of time shall be granted for the filing of the petition to transfer or accompanying briefs." (Emphasis added.)

The denial on Hahn's "Petition to Transfer" to the Indiana Supreme Court concluded the appeal process in the state courts of Indiana.

The record in the state court proceedings, as well as the Appellant's own statement in his Jurisdictional Statement at page 7, § B. "Raising the Federal Constitutional Question," reflects that the constitutional issue was neither timely nor properly raised and was not expressly passed on.

II. & III.

Bryant-Poff, Inc., successfully argued in its appeal that upon the evidence as presented by Dennis Hahn at the trial and based upon the Indiana substantive and procedural law concerning imposition of strict liability as related to §402A of the Restatement of Torts, or on a negligence theory, the trial court erroneously failed to grant its Motion for Judgment on the Evidence.

The "open and obvious danger rule" finds support in Indiana cases and cases decided in federal courts applying Indiana law in diversity.

In the *Bemis* case, *supra*, at p. 1061 in the reported case, the Indiana Supreme Court stated:

"The rule may be stated generally as follows: In the area of products liability based upon negligence or based upon strict liability under §402A of the Restatement (2d) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer has actual or constructive knowledge of an unobservable defect or danger it is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all. See *Burton v. L. O. Smith Foundry Products Co.*, 529 F.2d 108 (7th Cir. 1976); *Posey v. Clark Equipment Company*, 409 F.2d 560 (7th Cir. 1969); *Greeno v. Clark Equipment Co.*, 237 F. Supp 427 (N.D.Ind. 1965); and *J. I. Case Company v. Sandefur*, (1964) 245 Ind. 213, 97 N.E.2d 519."

After a thorough appellate review, the Indiana Court of Appeals, First District, in applying the Indiana law as it relates to the evidence as shown by the record in the trial of Dennis Hahn's case, determined that Bryant-Poff, Inc.'s, Motion for Judgment on the Evidence should have been granted.

Oral argument was granted before the Indiana Court of Appeals, First District. Thereafter, oral argument was granted by the Indiana Supreme Court on Dennis Hahn's Petition to Transfer. Transfer was denied.

Counsel for Dennis Hahn in his "Jurisdictional Statement" has placed at issue the integrity of the Indiana Supreme Court with reference to the *Hahn v. Bryant-Poff, Inc.*, decision and the reported case of *Hoffman v. E. W. Bliss Company, supra*.

It would appear from the record in the *Hoffman* case that plaintiff (Hoffman) was in fact a son of an Indiana Court of Appeals jurist.

The factual issues and evidence in the *Hahn* litigation and the *Hoffman* litigation are dissimilar although both cases involve claims relating to products liability litigation.

The *Hoffman* case was remanded to the trial court by reason of the erroneous instruction.

The case at bar was decided on appeal by exhaustive review of the evidence and whether or not, based upon such evidence as submitted by plaintiff Hahn and the applicable Indiana substantive and procedural law, whether the trial court erroneously overruled the Motion for Judgment on the Evidence requested by defendant Bryant-Poff, Inc., at the trial.

The Indiana Court of Appeals, First District, and the Indiana Supreme Court found that the trial court had erred on that issue and in the appeal process entered judgment for Bryant-Poff, Inc.

Each case in the appeal process must stand on its own merits based upon a review of separate, independent factual situations presented at the trial.

As noted in Bryant-Poff, Inc.'s, discussion of the "Statement of the Case", it herein took issue with the statement by Appellant Hahn that the Indiana Supreme Court reversed and remanded a trial court judgment in favor of defendant, Bliss, and that it (Indiana Supreme Court):

"... decided that whether the danger of the product involved was a latent one or was 'open and obvious' was a question of fact for the jury to determine."

Again, based upon the factual issues as presented in the *Hoffman v. E. W. Bliss Company* case, the Indiana Supreme Court did review the evidence upon an argument

by Bliss Company that "the open and obvious danger rule" served to save the instructions's misstatement of law.

After a careful *examination of the evidence* in the *Hoffman v. E. W. Bliss Company* case, the Indiana Supreme Court did determine whether the danger in the product which Hoffman encountered was "truly and entirely open and obvious".

The Indiana Supreme Court concluded that *as a matter of law* it could not say that Hoffman's injury was caused by an open and obvious danger. The Indiana Supreme Court's decision stated:

"Hoffman produced evidence tending to show contrary, that the ram's dissent was *due to either a true double trip or an uninitiated spontaneous cycle* of the press." (See p. A-99 in Appendix of Petitioner's Jurisdictional Statement.)

The Indiana Supreme Court reviewed meticulously the factual issues in both Appellant Hahn's case and in plaintiff Hoffman's case.

Its determination was that the evidence and factual issues presented by Hoffman and by Appellant Hahn were dissimilar. The Indiana law was applied uniformly in both cases as it applied to the separate *factual evidence* and issues.

This court will not grant certiorari merely to review evidence or inferences drawn therefrom. *NLRB v. Pittsburgh S.S. Co.*, 340 US 498, 95 L.Ed 479, 71 S.Ct. 453, 27 BNA LRRM 2382, 19 CCH LC Paragraph 66192; Federal Practice and Procedure, 32A Am.Jur. 2d, §787.

It is respectfully submitted that the Jurisdictional Statement does not present a substantial federal question and that the judgment of the Supreme Court of Indiana rests on adequate non-federal basis.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed.

Respectfully submitted,

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